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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,
Appellant,

v.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the Supreme Court of Florida

REPLY BRIEF FOR APPELLANT THE MIAMI HERALD PUBLISHING COMPANY

Daniel P. S. Paul
James W. Beasley, Jr.
PAUL & THOMSON
1300 First National Bank Bldg.
Miami, Florida 33131
Counsel for Appellant,
The Miami Herald
Publishing Company

Of Counsel:
Richard M. Schmidt, Jr.
Martin J. Gaynes
Ian D. Volner
COHN & MARKS
1920 L. Street, N.W.
Washington, D.C. 20036

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I. INTRODUCTION.

Appellee Tornillo has attempted to support the decision of the Florida Supreme Court on the grounds that the Florida compulsory publication statute is a limited incursion upon the editorial discretion of newspapers which serves the objectives and enhances the values of the First Amendment. A careful reading of Tornillo's brief, however, shows that he seeks a fundamental revision of the First Amendment to permit the government to tell the press what to print.

Tornillo seeks to persuade this Court that a major revolution in First Amendment theory is demanded by painting a stark picture of a monolithic, monopolistic media, armed by *New York Times v. Sullivan* with a license to libel, relentlessly suppressing public debate and mercilessly hounding helpless politicians. Tornillo's own plight is cited as a typical example of unfairness of the press. To correct this supposedly grim situation, Tornillo proposes that the government begin to regulate the fairness and balance of newspaper coverage of public issues.

Tornillo has failed to justify the profound and fundamental revision of the First Amendment required by the Florida compulsory publication statute. Tornillo's self-portrayal as a lonely voice isolated in the political wilderness by a hostile press is simply untrue. *The Herald* editorially opposed Tornillo's election, but covered his campaign in news articles and published his paid political advertisements almost daily. Three other newspapers editorially supported Tornillo's candidacy. As with any political candidate in Dade County, Tornillo has enjoyed the benefit of extensive press coverage, and has had ac-

cess to a variety of modes of communication to urge his views on the citizens of Dade County.

Tornillo has not demonstrated that the press is so powerful and unfair that the historic constitutional ban upon governmental regulation of the content of newspapers should be abandoned. The issue in this case is not whether the press ought to be fair, but whether it ought to be free. Every responsible newspaper recognizes a professional obligation to provide reasonable coverage of all significant points of view, and strives for objective reporting of the news. The basic question in this case is whether the government has the power to tell newspapers what to print. The First Amendment compels a negative answer to that question.

There is no justification for scrapping our system of free and independent expression in search of a utopia where the government seeks to guarantee that every argument is fair and that every voice has equal space. Any effort to legislate "fairness" in newspapers will inevitably lead to pervasive governmental control. Such a result is neither warranted by the Constitution nor desirable from any rational interest in free expression.

II. TORNILLO HAS NOT REBUTTED THE HERALD'S SHOWING THAT THE FLORIDA COMPULSORY PUBLICATION STATUTE VIOLATES THE FIRST AMENDMENT.

A. The statute is in fundamental conflict with the First Amendment.

Tornillo attempts to persuade the Court that the Florida statute should be upheld because it has a worthy objective—assuring "full and fair discussion" of public issues—and there is no direct precedent for striking down the statute.[1] The Court need not approach this case in the vacuum postulated by Tornillo. Familiar First Amendment principles provide ample guidance for testing the Florida statute against the Constitution. It is clear from the numerous authorities cited in *The Herald's* brief that the Florida statute conflicts fundamentally with the First Amendment.

Tornillo asks the Court to disregard all prior cases dealing with compulsory access to the press on the ground that those cases involved attempts to have courts fashion a First Amendment right of access. A state statute, it is claimed, stands somehow on constitutionally distinguishable grounds. *The Herald's* brief recognized that cases involving statutes are obviously different from those which do not.[2] However, the First Amendment forbids the government to dictate the contents of a newspaper. As stated in

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[1]Brief for Appellee at 5 ff.

[2]Brief for Appellant at 18.

The Herald's brief, "Whether governmental compulsion is by court decree, or by statute, is constitutionally irrelevant."[3]

All courts except the Florida Supreme Court which have considered attempts to compel access to the press have rejected such claims.[4] The primary rationale of those cases has been that compulsory access violates the First Amendment rights of the publishers whose presses are sought to be commandeered. Tornillo has asserted no basis for concluding that legislatures are more free to violate the First Amendment than courts.

The issue in this case is not a technical one of state action. The issue is whether the government can tell newspapers what to print. Professor Emerson has pinpointed the reason that the Florida statute is unconstitutional:

> "It means that the government can tell the newspapers that the newspapers can be forced to print material they don't want to print. This is the very opposite of freedom of the press."[5]

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[3]Brief for Appellant at 18, footnotes omitted.

[4]*E.g., Chicago Joint Board, Amal. Cloth. Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. den.*, 402 U.S. 973 (1971); *Opinion of the Justices*, 298 N.E.2d 829 (Mass. 1973); *cf. Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973).

[5]T. Emerson, quoted in Gartner, "A New Cloud for the First Amendment," *The Wall Street Journal*, July 30, 1973, also quoted by R. Traynor, "Speech Impediment and Hurricane Flo," reprinted in 120 *Cong. Rec.* S 1105 (February 4, 1974). Professor Emerson has thus recognized that his previous speculation that "reply" legislation might be constitutionally permissible cannot be reconciled with his views that the press must be free of governmental regulation. *Compare* Emerson, *The System of Freedom of Expression*, 667-668 and 670-671 (1970).

Governmental intrusion on a newspaper's editorial discretion is in basic conflict with our First Amendment traditions. The authors of the First Amendment are unlikely to have intended it to allow the government to require Peter Zenger to give reply space to the British. Benjamin Franklin believed "that his newspaper was not a stagecoach with seats for everyone . . ."[6]

The First Amendment assures public expression of opinion, but not by governmental regulation of the fairness or balance of the content of the press.[7] The Florida statute attempts the "authoritative selection" of the content of newspapers which Judge Learned Hand found forbidden by the First Amendment.[8] As Mr. Justice Stewart has expressed, it is "a clear command" of the First Amendment "that Government must never be allowed to

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[6] Mott, *American Journalism* 55 (1962) quoted in *Columbia Broadcasting System v. Democratic National Committee, supra* at 152 (Douglas, J., concurring).

[7] "'[P]rotection of the public from interested and improperly influenced news coverage' is not a compelling governmental interest . . . it may in fact be an interest with which the government may not constitutionally concern itself at all. The very essence of a free press is that there is room in our country for publication by every segment of 'interested' opinion, and that out of the free comparison of opinions of different "interested" sides, citizens can make their own determination as to truth."

Lewis v. Baxley, Civ. No. 4182-N, 13 (M.D. Ala. Dec. 21, 1973) (three-judge court). This case held unconstitutional a state statute which sought to protect citizens against improperly influenced newsmen by requiring financial disclosure from newsmen prior to admitting them to state legislature galleries.

[8] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), *quoting United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943).

lay its heavy editorial hand on any newspaper in this country."[9]

The First Amendment presupposes an intelligent citizenry, not courts or governmental agencies, will act as the ultimate arbiters of the quality of the content of the press.

> "In the final analysis, the readers are the ultimate 'controllers' no matter what excesses are indulged in by even a flamboyant and venal press; that it often takes a long time for these influences to bear fruit is inherent in our system."[10]

B. The statute is not required to assure full public debate.

The Florida Supreme Court held that the Florida statute promotes the objectives of the First Amendment. Tornillo seeks to sustain that holding by painting a distressing self-portrait of a politician without a stump. Tornillo asserts that this case "illustrate[s] the silencing of debate" and "absent the Florida right of reply statute, Tornillo would be effectively muzzled in Dade County, Florida."[11] The true situation is admitted by Tornillo's self-characterization in his brief as an "outspoken advocate" who serves as a "citizen critic" of government.[12] Tor-

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[9] *Pittsburgh Press Co. v. Human Rela. Comm.*, 413 U.S. 376, 403-4 (Stewart, J., dissenting).

[10] *Id.* at 395 (Burger, C.J., dissenting).

[11] Brief of Appellee at 24, 29.

[12] Brief of Appellee at 24-25.

nillo fails to explain how he has fulfilled these roles while "effectively muzzled" by the press in Dade County.

The explanation is simple. Tornillo has enjoyed wide news coverage in Dade County and has been the subject of both favorable and unfavorable editorial commentary. During the campaign for the state legislature in the fall of 1972, Tornillo, together with all other candidates, received extensive coverage in the news columns of *The Herald.*[13] *The Herald* published political advertisements submitted and paid for by Tornillo almost daily during the month preceding the election.[14] *The Herald* editorially opposed Tornillo's candidacy. Miami's other major daily newspaper, *The Miami News,* endorsed Tornillo.[15] Two other newspapers also supported his candidacy.[16]

The press, Tornillo claims, have been armed by this Court with a license to libel, and are eager to "attack

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[13]*The Miami Herald,* July 21, 1972 at 2B; August 30 at 5D; September 10 at 21-O; September 23 at 3D; September 26 at 20A; September 29 at 11C; October 3 at 2B; October 4 at 15A and 1B.

[14]*The Miami Herald,* September 10, 1972 at 4B; September 10 at 32-O; September 11 at 29A; September 17 at 2E; September 21 at 30A; September 23 at 10A; September 24 at 7E; September 25 at 24A and 30C; September 26 at 21A; September 28 at 18A; September 29 at 8B; September 30 at 25A; October 1 at 14C; October 2 at 28A, 19B and 5D.

[15]*The Miami News,* August 24, 1972 at 31A; September 11 at 30A; October 2 at 30A.

[16]*The Miami Herald,* October 1, 1972 at 14C (Tornillo political advertisement announcing his endorsement by *The Miami News, The Miami Beach Sun-Reporter,* and *The North Dade Journal.)*

their prey as they will."[17] Absent compulsory access or rights to reply, we are told, public debate will be silenced.[18]

The spectre of worthwhile ideas shut off from the channels of communication by a monopolistic media dominating a monolithic marketplace of ideas is a fantasy unsupported by evidence and contradicted by common experience. For example, in Dade County, there are two major daily newspapers, four other daily newspapers, thirty-one weekly newspapers, six commercial TV stations, a community television station, and twenty radio stations.[19] In addition, a number of magazines are published in the County, together with various periodicals of limited circulation, including publications of private organizations such as unions. Nationally and regionally published newspapers, magazines, and other periodicals also circulate in the County. Political candidates also have access to billboards, pamphlets, handbills, bumper stickers, and public meetings.

In smaller cities and towns, of course, the channels of communication may be less extensive. However, the number of people to be reached is correspondingly fewer, so that the efficacy of direct communication, such as public speeches and handbills placed on every doorknob, is enhanced.[20]

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[17]Brief of Appellee at 29.

[18]Brief of Appellee at 24.

[19]*Dahne's News Media Directory for South Florida* at 1-10, 25-67, 131-137, 161-175 (Hollywood, Fla. 1972).

[20]*See Branzburg v. Hayes* 408 U.S. 665, 704-05 (1972); *Martin v. Struthers*, 319 U.S. 141, 146 (1942); *Schneider v. State*, 308 U.S. 147 (1939).

Tornillo's claims of muzzled public debate are therefore hollow.[21] Tornillo has proposed that the test of the validity of the compulsory publication statute should be whether the material for which publication is sought has been "suppressed and underrepresented".[22] Tornillo cannot meet his own test.

Even if Tornillo could cite a valid example of "suppression and underrepresentation", it could not justify upholding the Florida statute. The First Amendment guarantees each individual a right to say what he pleases, with carefully limited exceptions, but it does not guarantee him a mode of communication, an audience, or the financial means to secure either.

> "No society that ever existed has afforded equal access to the means of communication to all its members or groups. . . . In fact the effort to achieve such equality by government allocation, without any reliance upon laissez-faire factors, might jeopardize rather than better the system. . . . The history of the civil-rights movement, the peace movement, the black movement, and others in recent years indicates that minorities have found ways to be heard. . . . The problem of equality is a crucial one, but the remedy is betterment

[21] "[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate to the contrary." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971) (footnote omitted).

[22] Brief of Appellee at 48.

of the system, not abandonment. Again, the alternative would be worse."[23]

C. The effect of upholding the statute will be to suppress public debate.

In its brief, *The Herald* showed that in practical operation the Florida statute would have an effect directly opposite of that claimed for it — it would restrict, not enhance, public discussion.[24] Newspapers, Tornillo claims, are saying that if they are forced to play fair, they won't play at all. As discussed above, the issue in this case is not whether fairness is desirable, but whether governmental regulation designed to compel newspapers to be "fair" violates the First Amendment.

Tornillo claims the Florida statute will not prevent *The Herald* from saying anything it wishes.[25] That is true only if *The Herald* is willing to pay the heavy price which the statute exacts for printing criticism (whether in news stories, editorials, columns, advertisements, or elsewhere) of political candidates.[26] No matter how accurate the criticism, no matter how extensively the issues have al-

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[23]Emerson, *The System of Freedom of Expression*, *supra* at 727. *See Kovacs v. Cooper*, 336 U.S. 77, 102 (1948) (Black J., dissenting).

[24]Brief of Appellant at 29-32.

[25]Brief of Appellee at 5.

[26]Tornillo's assertions that the statute applies only to "editorial attacks" (Brief for Appellee at 39, 55) are directly contradicted by the terms of the statute and its interpretation by the Florida Supreme Court. 287 So.2d 86, Appendix 30. Although the precise meaning of the phrase "in its columns" is unclear, there is no basis for assuming that the statute applies only to editorial columns.

ready been covered, *The Herald* will be forced to provide space for a verbatim "reply". The greater its coverage of political campaigns, the greater the preemption of *The Herald's* columns for "replies."

Tornillo's counsel has admitted, "The paradox, therefore, is that a larger access is dependent upon censorship, a minimal censorship to be sure, but nonetheless censorship."[27] The reinterpretation of the First Amendment required to affirm the decision below would convert the press to a governmentally-supervised public utility, as Professor Barron has freely conceded.[28]

D. There is no state interest in fair elections sufficient to justify the statute's intrusion on the First Amendment.

Tornillo has attempted to disguise the Florida statute as permissible state regulation no different, constitutionally, than a host of other state statutes which regulate various aspects of newspaper publication. Such legislation, collected in Appellee's Appendix, is irrelevant to the issues in this case.[29]

The Herald has not contended that the First Amendment precludes governmental regulation of some aspects of newspaper publication. The press can be regulated

[27]Barron, *Freedom of the Press for Whom?* 288 (1973).

[28]*Id.* at 25, 308, 325; Barron, "Access to the Press," 80 *Harv. L. Rev.* 1641, 1666 (1967).

[29]The constitutionality of each such statute is assumed by Tornillo. At least two of the statutes cited by Tornillo, §§104.372 and 104.35, Fla. Stat., are now under constitutional attack in federal court. *Gore Newspapers Co., v. Florida*, Civ. No. 74-103 (S.D. Fla. filed April 4, 1974).

on commercial and economic matters, as any other business.[30] It is likewise fundamental that certain paramount state interests may override freedom of expression, such as protection from obscenity.[31] However, the Court has "underline[d] the narrowness of the recognized exceptions to the principle that the press may not be regulated by the Government."[32] The Florida statute fits no such narrow exception.

Tornillo's argument was answered by Judge Learned Hand in *United States v. Associated Press:*

> "[T]he mere fact that a person is engaged in publishing, does not exempt him from ordinary municipal law, *so long as he remains unfettered in his own selection of what to publish.*"[33]

Tornillo concedes that the Florida statute will place governmentally imposed constraints upon the content of newspapers.[34] It is impossible to reconcile such regulation with the "protection afforded to editorial judgment"[35] by the First Amendment. No valid state interest has been presented to bridge this constitutional chasm.

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[30] *E.g., Associated Press v. United States,* 326 U.S. 1 (1945).

[31] *E.g., Roth v. California,* 354 U.S. 476 (1957).

[32] *Pittsburgh Press Co. v. Human Rela. Comm., supra* at 382.

[33] 52 F.Supp. 362, 374 (S.D. N.Y. 1943) (emphasis added) *aff'd.,* 326 U.S. 1 (1945).

[34] Brief of Appellee at 46, 49.

[35] *Pittsburgh Press Co. v. Human Rela. Comm., supra* at 391.

E. The Newspaper Preservation Act is not relevant to this case and provides no constitutional support for the statute.

Tornillo's brief asserts that if the Newspaper Preservation Act[36] is constitutional, the Florida statute must also be constitutional, since both attempt to assure diversity of opinion.[37] Tornillo's attempted analogy cannot withstand analysis. The Newspaper Preservation Act was held in *Bay Guardian Co. v. Chronicle Pub. Co.* to be "a narrow exception to the anti-trust laws for newspapers in danger of failing" which was "designed to preserve independent editorial views."[38] As attempted in the *Bay Guardian* case, Tornillo has contrived a "phantom act." On the contrary, "the Act . . . does not confer any license to monopolize and indeed has a specific provision prohibiting 'predatory practices' (§1803(c))."[39]

Tornillo's unsupported assertion that *The Herald* has received "special immunity from the antitrust laws" from the Newspaper Preservation Act is untrue.[40] *The Herald's* agreement with *The Miami News* was made before the Act was adopted, and received advance approval of the Justice Department. The publisher of *The Herald* editorially opposed enactment of the Newspaper Preserva-

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[36]15 U.S.C. §§1801-04.

[37]*E.g.*, Brief of Appellee at 7-8.

[38]*Bay Guardian Company v. Chronicle Publishing Company*, 344 F.Supp. 1155, 1157-58 (N.D. Cal. 1972).

[39]*Id.* at 1158.

[40]Brief of Appellee at 6.

tion Act. The joint operating agreement between *The Herald* and *The Miami News* has not undermined the editorial independence of either newspaper, since *The Herald's* joint operating partner, *The Miami News*, endorsed Tornillo's candidacy both in the primary and general elections.[41]

Thus nothing in the Newspaper Preservation Act undercuts the argument made in *The Herald's* brief that if illegal monopolization exists in the press, the antitrust laws are adequate to deal with such situations. Alleged fears of concentration and monopolization cannot justify the Florida statute's intrusion upon freedom of the press.

F. The statute's vagueness will subject newspapers to uncertainty, and its interpretation will require a substantial volume of litigation.

Tornillo's brief does not dispute the vagueness of the terms of the Florida compulsory publication statute. Tornillo seeks to minimize the implication of this fact by arguing that the statute's terms can be clarified in subsequent litigation, and that the statute's terms are no more vague than the personal attack rules of the Federal Communications Commission. Both arguments demonstrate the validity of *The Herald's* contention that the statute is excessively vague and will have a chilling effect upon freedom of expression.

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[41] *See* fn. 15, *supra*.

Tornillo argues that the Florida statute clearly applies to the facts of this case and that it is somehow improper to raise questions as to the scope of the statute in other cases. Tornillo ignores the fact that *The Herald* has questioned the constitutionality of the statute *on its face.*

Tornillo does not deny that the statute's terms are vague and ambiguous, and that clarification of the statute's terms will require extensive litigation.[42] Tornillo further concedes that the statute will have a chilling effect upon free expression.[43] Even if courts were free to rewrite such vague statutes in the guise of defining their terms,[44] Tornillo's concessions establish conclusively that the statute's vagueness will subject newspapers circulated in Florida to extensive litigation, which will necessarily have an unconstitutional chilling effect upon coverage of political campaigns.[45]

Tornillo's attempted analogy to the terminology used in Florida's "retraction" statute (§770.02, Fla. Stat.) is likewise faulty, for two reasons. First, due to the substantial differences in language between the two statutes, not one of the six categories of questions raised by the compulsory publication statute are raised by the retraction statute.[46] Second, the retraction statute is an optional pro-

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[42]Brief of Appellee at 55-58.

[43]Brief of Appellee at 60.

[44]Such judicial rewriting is impermissible. *E.g., United States v. Robel,* 389 U.S. 258, 262 (1967); *Aptheker v. Secretary of State,* 373 U.S. 500, 516 (1964).

[45]*E.g., New York Times Co. v. Sullivan, supra* at 279.

[46]See Brief of Appellant at 34-35; Brief of Appellee at 55-57.

tection of newspapers from punitive damages, not a requirement to publish without discretion. A newspaper unsure of the availability of the retraction statute may choose to publish a retraction in the hope that the statute is available to mitigate damages. If a newspaper guesses wrong about the applicability of the compulsory publication statute, however, it faces criminal prosecution and civil liability for damages and injunctions.

Tornillo's reliance upon the Court's rejection of vagueness arguments in *Red Lion* is unsound. In *Red Lion*, the Court specifically relied upon the ability of the Federal Communications Commission to interpret its regulations.[47] No such regulatory interpretation is available to implement the Florida statute. Professor Barron predicts that statutes regulating access to the press will require extensive governmental supervision, but rather than foreseeing the rise of regulatory agencies for newspapers, he predicts the burden will be borne by the judiciary.[48]

III. TORNILLO CONCEDES THE COURT HAS JURISDICTION OF THIS CASE.

Tornillo agrees with *The Herald* that the decision below was final for purposes of 28 U.S.C. §1257. In a recent unanimous opinion which reaffirmed many of the

[47]*Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 392 (1969).

[48]Barron, *Freedom of the Press for Whom?* *supra* at 54, 65.

principal cases cited by *The Herald* in its initial brief,[49] the Court held in *North Dakota Pharmacy Bd. v. Snyder's Stores* that Section 1257 was intended to "avoid piecemeal review," and that requisite finality was present despite the state court's remand for hearings "sans the constitutional issue."[50] An almost identical situation exists here, made even more compelling by the importance of the constitutional rights at issue and the pressing need for their immediate resolution.

[49] *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Mills v. Alabama*, 384 U.S. 214 (1966); *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386 (1964); *Local No. 438 Construction & General Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542 (1963); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963); *Brady v. Maryland*, 373 U.S. 83 (1963).

[50] 38 L.Ed.2d 379 (1973).

IV. CONCLUSION

For the reasons above, and those stated in *The Herald's* brief and in the briefs of *amici curiae* in support of *The Herald*, the judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

Daniel P. S. Paul

James W. Beasley, Jr.

PAUL & THOMSON
1300 First National Bank Building
Miami, Florida 33131
Counsel for Appellant

Of Counsel:

Richard M. Schmidt, Jr.
Martin J. Gaynes
Ian D. Volner
COHN AND MARKS
1920 L Street, N. W.
Washington, D. C. 20036